79-474

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. _____

THE INDIANA EMPLOYMENT SECURITY BOARD, *et al.*,

Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Chief Counsel-Staff

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6217

Attorneys for Petitioners.

INDEX

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Provisions:

Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. _____

THE INDIANA EMPLOYMENT SECURITY BOARD, *et al.*,

Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, the Indiana Employment Security Board by and through its individual members, William H. Andrews, George Elrod, Glenn Ray, Richard O. Ristine, and Max Wright; the Indiana Employment Security Division, Unemployment Compensation Section, by and through its Review Board Members William H. Skinner, J. Frank Hanley II, and Ralph F. Miles; and the Indiana Employment Security Division, Unemployment Compensation Section by and through its Appellate Division Chief, Keith Campbell, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) entered in this proceeding on

June 22, 1979. That opinion was pursuant to an appeal by respondents International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW; Barbara Kubisiak; Lynda Baker; Barbara Robbins; Doris Kuntz, and Sherry Blocher.

OPINIONS BELOW

The opinion of the Seventh Circuit appears at 600 F.2d 118 and is attached at page A-1 of this petition. The unreported Memorandum of Decision issued August 10, 1978, by the United States District Court for the Southern District of Indiana, Indianapolis Division (hereafter District Court) and its Entry of October 27, 1978, also unreported, are attached at pages A-5 and A-10 respectively.

JURISDICTION

The Seventh Circuit decided this cause on June 22, 1979, and no rehearing has been sought. This petition for certiorari was filed within the 90-day period allowed by 28 U.S.C. §2101(c). Jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 19(1)(b) of the Rules of this Court, to review an opinion of the Seventh Circuit which has rendered a decision on a federal question contrary to applicable decisions of this Court, the result of which was to declare two Indiana statutes unconstitutional.

QUESTIONS PRESENTED

1. Whether this cause was barred by the Eleventh Amendment to the Constitution of the United States.
2. Whether the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States invalidates a state unemployment compensation statute which does not include among its beneficiaries persons barred from work by their employers because of pregnancy.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens of subjects of any foreign state.

The Fourteenth Amendment to the Constitution of the United States provides, in part, as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Code §22-4-14-3 (Burns 1974, tit. 22, pp. 428-429) (repealed in relevant part, Pub. L. 253 §1 (1975)):

> An unemployed individual shall be eligible to receive benefits with respect to any week only if he is physically and mentally able to work, is available for work and is found by the division to be making an effort to secure work . . . For the purpose of this article [22-4-1-1 — 22-4-38-3], unavailability for work of an individual shall be deemed to exist but shall not be limited to, any case in which, with respect to any week, it is found:
>
> . . . (d) That such individual's unemployment is due to pregnancy . . . .

Indiana Code §22-4-15-1 (Burns 1974, tit. 22, pp. 434-436) (repealed in relevant part, Pub. L. 262, §25 (1977)):

> [A]n individual shall be ineligible for any waiting period or benefit rights based upon wages earned from any employer whose employ he has left voluntarily without good cause attributable to the employer or from which he has been discharged for misconduct in connection with his work: Provided, however that . . . [s]eparation from employment be-

> cause of pregnancy shall be construed as within the purview of the disqualification provided herein . . . .
>
> The disqualifications provided in this section shall be subject to the following modifications: . . . . (4) An individual who is separated from employment because of pregnancy shall be subject to disqualification under this section only if she fails to apply for or to accept a leave of absence under a plan provided by the separating employer.

Indiana Code §22-4-2-4 provides as follows:

> "Contributions" means the money payments to the employment security fund, required and provided by the terms of this act [22-4-1-1 — 22-4-38-3]. [Acts 1947, ch. 208, §204, p. 673.]

Indiana Code §22-4-2-9 provides as follows:

> "Fund" means the employment security fund, established by IC 1971, 22-4-26-1, in which all contributions required[,] all payments in lieu of contributions and all money received from the federal government as reimbursements pursuant to section 204 of the Federal-State Extended Compensation Act of 1970, 26 U.S.C. §3304n, shall be deposited and from which all benefits provided under this article [22-4-1-1 — 22-4-38-3] shall be paid. [Acts 1947, ch. 208, §209, p. 673; 1971, P.L. 355, §1, p. 1376; 1973, P.L. 239, §1, p. 1242.]

Indiana Code §22-4-10-1 provides, in part, as follows:

> Contributions shall accrue and become payable from each employer for each calendar year in which it is subject to this article [22-4-1-1 — 22-4-38-3] with respect to wages paid during such calendar year except where the status of an employer is changed by cessation of disposition of business or appointment of a receiver, trustees, trustee in bankruptcy or other fiduciary, contributions shall immediately become due and payable on the basis of wages paid or payable by such employer as of the date of the change of status. Such contributions shall be paid to the board in such manner as the

> board may prescribe, and shall not be deducted, in whole or in part, from the remuneration of individuals in an employer's employ.

STATEMENT OF THE CASE

This action was brought by Respondents pursuant to 42 U.S.C. §§ 501 *et seq.*, 1983, and 2000e-2, to secure payment of unemployment benefits to five (5) females who alleged they were denied such benefits due to pregnancy. Respondents alleged violations of the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution of the United States and also sought declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

Facts Material To Questions Presented For Review

At issue in the District Court were portions of Indiana Code § 22-4-14-3 and § 22-4-15-1 (Burns 1974), the relevant parts of which have since been repealed. Respondents sought certification as a class, injunctive and declaratory relief, and unemployment compensation payments with interest thereon. Petitioners moved for dismissal on several grounds, and the District Court granted that motion based upon Respondents' failure to state a claim upon which relief could be granted. A-9. Respondents then moved the court to reconsider, and to alter or amend its judgment. The District Court reconsidered this Court's opinions in *Turner v. Department of Employment Security, infra,* and *Cleveland Board of Education v. LaFleur, infra,* and, finding them inapposite, denied the motion. A-10.

The Seventh Circuit reversed the judgment and remanded the case for further proceedings, holding that the statutes violated the Due Process Clause as it was applied in *Turner.*

Answers to Interrogatories filed in this case show that of the four original individual Plaintiffs in the District Court, three had never applied for unemployment compensation benefits and the fourth had not received a determination from the reviewing deputy. A fifth plaintiff who alleged a denial of benefits was added in the Second

Amended Complaint, which was allowed to be filed by leave of Court in the Memorandum of Decision that rendered judgment in favor of the Defendants.

Those Interrogatory Answers also show that the periods of time between separation from employment and childbirth for the five named Plaintiffs were 3, 39, 40, 91 and 128 days.

REASONS FOR ALLOWANCE OF THE WRIT

I.

This Cause is Barred by the Eleventh Amendment to the Constitution of the United States.

Petitioners would submit that jurisdiction in this case was barred by the Eleventh Amendment to the Constitution of the United States. Respondents herein brought this action against the Petitioner boards and divisions and their members in their official capacities for the payment of past workmen's compensation benefits which were alleged to have been wrongfully denied. As such, this is a suit against the State of Indiana since the Petitioners are but nominal parties and any recovery will come from public funds derived from the State Treasury. Indiana Code §§ 22-4-2-4, 22-4-2-9, and 22-4-10-1. *Ford Motor Company v. Department of Treasury of State of Indiana,* 323 U.S. 459 (1945).

Injunctive relief has obviously been precluded since the statutes being challenged have been repealed by the Indiana General Assembly. Therefore, the only relief that could possibly be ordered by the District Court would be the payment of past benefits. Such payments would be precluded under *Edelman v. Jordan,* 415 U.S. 651 (1974).

II.

The Seventh Circuit's Decision Rests on the Application of Law Inapposite to the Facts of This Case.

The Seventh Circuit stated that "we are of course bound to follow the *Turner* holding," which it interpreted to

mean that a "state statute that denies unemployment benefits to all women who are unemployed because of pregnancy without regard to whether individual pregnant women have the physical capacity to continue work is invalid . . . ." The fact situation in the case at bar, however, does not warrant application of *Turner v. Department of Employment Security,* 423 U.S. 44 (1975).

The statute at issue in *Turner* raised "a conclusive presumption that women are 'unable to work' during" a period extending from twelve weeks prior to the expected birth to six weeks after the birth, *id.* at 45. This Court held that the "statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid under the principles of" *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974). Id. at 46. At issue in *LaFleur* was a school board rule requiring pregnant teachers to take a leave extending from five months before the expected date of birth until the beginning of the semester following the date when the child was three months of age. In a companion case to *LaFleur, Cohen v. Chesterfield County School Board,* 414 U.S. 632 (1974), decided the same day, the school regulations at issue were essentially the same. This Court held that due process requires something other than a blanket rule to accomplish the school boards' goals. Although this Court has not articulated what "alternative administrative means" (*id.* at 647) are required, it noted that its holding did *not* require "an individualized determination in each case and in every circumstance," *id.* at n. 13.

The Indiana statutes invalidated by the Seventh Circuit did not prescribe any period during which pregnant persons should be separated from employment; they left that determination up to the employers and the workers. Likewise, the statutes at issue did not incorporate "a conclusive presumption of incapacity." One of the laws deemed an individual whose "umemployment is due to pregnancy" to be unavailable for work (Ind. Code Ann. § 22-4-14-3 (Burns 1974)); the other disqualified from benefit rights a woman separated from employment due to pregnancy "only if she fails to apply for or to accept a leave of absence under a plan provided by the separating employer" (Ind.

Code Ann. § 22-4-15-1 (Burns 1974)). As the District Court correctly realized.

> . . . Indiana creates no blanket presumption. The system merely assumes that if a woman terminates her employment because of pregnancy it is done voluntarily and without good cause. It is hard to conceive of a more reasonable basis upon which the Indiana legislature could have excluded pregnancy, an action which it is constitutionally permitted to make.

Because the invalidated statutes did not prescribe any period of unemployment and did not conclusively presume incapacitation, the Seventh Circuit erred in applying *Turner* to them. Instead, the applicable cases are *Nashville Gas Co. v. Satty,* 434 U.S. 136 (1977), *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), and *Geduldig v. Aiello,* 417 U.S. 484 (1974), which upheld similar pregnancy-excluding programs attacked on statutory and constitutional grounds.

The results of the Seventh Circuit's error could have far reaching effects. Respondents, in District Court, sought certification of a class composed of all persons, separated from work because of pregnancy, who did not receive unemployment compensation for the period of separation. One of the statutes at issue, Ind. Code § 22-4-14-3 (Burns 1974) was enacted in 1947 and partly repealed in 1975; the other, Ind. Code § 22-4-15-1 (Burns 1974) was amended to include the relevant portions in 1967 and 1971, and then partly repealed in 1977.

There is uncertainty as to the proper application of the *Aiello-Gilbert-Satty* and the *LaFleur-Turner* lines of cases, as is demonstrated by the opposite results reached by the District Court, in its two written opinions, and the Seventh Circuit, in the sentence quoted *supra,* at page 6. The resolution of this uncertainty will influence the lives and finances of many persons, including those who seek unemployment benefits, those who contribute to the fund, and the State of Indiana. If the District Court certifies a class as a result of the remand order, then the State will be forced to search unemployment records going back nearly thirty years, all as a result of the erroneous decision of the

Seventh Circuit which is contrary to applicable decisions of this court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion and judgment of the Seventh Circuit.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Chief Counsel-Staff

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6217

Attorneys for Petitioner.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 78-2548

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al.,
Plaintiff-Appellants,

v.

THE INDIANA EMPLOYMENT SECURITY BOARD, et al.,
Defendant-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 76-705-C — S. HUGH DILLIN, *Judge.*

ARGUED APRIL 25, 1979 — DECIDED JUNE 22, 1979

Before SWYGERT, *Circuit Judge,* MOORE, *Senior Circuit Judge,** and TONE, *Circuit Judge.*

TONE, *Circuit Judge.* The issue in this case is the constitutionality of Indiana statutory provisions, now repealed, that denied unemployment compensation to women who were willing and able to work but were denied the opportunity to do so because of pregnancy. We hold these provisions unconstitutional and reverse the district court's judgment to the contrary.

---

* The Honorable Leonard P. Moore, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, is sitting by designation.

The plaintiff union brought the action both as an employer-contributor to an employment compensation fund governed by the Indiana Employment Security Act, Ind. Code Ann. § 22-4-1-1, *et seq.* (Burns), and on behalf of those of its members denied compensation from the fund because of the challenged statutory provisions. In addition, five individual plaintiffs assert claims for unemployment compensation and also seek to represent a class of all women similarly situated. The defendants are Indiana officials responsible for administering the Act. Proceeding under 42 U.S.C. § 1983, plaintiffs claim that the provisions in question violate the Fourteenth Amendment. Other alleged bases of jurisdiction and theories of invalidity need not concern us. The district court dismissed the action for failure to state a claim on which relief can be granted without determining whether the action should proceed as a class action.

The Indiana Employment Security Act provides for the payment of unemployment compensation benefits to unemployed persons who are able to work, available for work, and making an effort to obtain work, and who have neither left their previous place of employment voluntarily without good cause attributable to the employer nor been discharged for misconduct in connection with work. Ind. Code Ann. §§ 22-4-14-1 through 22-4-14-7 and 22-4-15-1 through 22-4-15-8 (Burns). The provisions challenged in this case provided that if an "individual's unemployment is due to pregnancy" she would be deemed unavailable for work and therefore ineligible to receive benefits, former § 22-4-14-3(d),[1] repealed in relevant part, Pub. L. 253, § 1 (1975), and that a woman separated from employment "because of pregnancy" was disqualified from

[1] Ind. Code Ann. § 22-4-14-3(d) (Burns) read in relevant part:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if he is physically and mentally able to work, is available for work and is found by the division to be making an effort to secure work . . . For the purpose of this article [22-4-1 — 22-4-38-38], unavailability for work of an individual shall be deemed to exist but shall not be limited to, any case in which, with respect to any week, it is found: . . .
>
> (d) That such individual's unemployment is due to pregnancy.

receiving unemployment benefits, § 22-4-15-1,[2] repealed in relevant part, Pub. L. 262, § 25 (1977). The amended complaint in the case at bar alleges that at least one of the individual plaintiffs was denied unemployment benefits on the ground, among others, of her pregnancy and that another was not even allowed to file a claim because of her pregnancy.

As we view the case, it falls squarely within *Turner v. Department of Employment Security of Utah,* 423 U.S. 44 (1975), which held unconstitutional under the Fourteenth Amendment a Utah statute that made "pregnant women ineligible for unemployment benefits for a period extending from 12 weeks before the expected date of childbirth until a date six weeks after childbirth." *Id.* In so holding, the Court relied upon *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974). Regardless of the current status of the irrebuttable presumption doctrine, *see Trafelet v. Thompson,* 594 F.2d 623, 629-630 (7th Cir. 1979), we are of course bound to follow the *Turner* holding. A state statute that denies unemployment benefits to all women who are unemployed because of pregnancy without regard to whether individual pregnant women have the

[2] Ind. Code Ann. § 22-4-15-1 (Burns) read in relevant part:

> With respect to benefit periods established subsequent to July 1, 1967 and prior to July 4, 1971, other provisions of this article [22-4-1-1 — 22-4-38-3] notwithstanding, an individual shall be ineligible for any waiting period or benefit rights based upon wages earned from any employer whose employ he has left voluntarily without good cause attributable to the employer or from which he has been discharged for misconduct in connection with his work: . . . Provided, further, however, That the provisions of this paragraph shall be subject to the following modifications:
>
> . . . (2) Separation from employment because of pregnancy shall be construed as within the purview of the disqualification provided herein . . .
>
> The disqualifications provided in this section shall be subject to the following modifications: . . .
>
> (4) An individual who is separated from employment because of pregnancy shall be subject to disqualification under this section only if she fails to apply for or to accept a leave of absence under a plan provided by the separating employer.

The Indiana legislature amended § 22-4-15-1 to include the first paragraph quoted above in 1967, Ind. Acts. ch. 310 § 19; it added the second quoted paragraph in 1971, Pub. L. 355 § 35.

physical capacity to continue work is invalid under that holding.

Indeed, counsel for defendants has recognized the authority of *Turner* in his oral argument and his brief, although in the latter a desultory reference is made to *Gelduldig v. Aiello*, 417 U.S. 484 (1974), *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), as cases "this case should follow." Counsel's only attempt to distinguish *Turner* is his argument that the challenged Indiana statutory provisions "do not deny the woman a chance to show that she is able and willing to work," and that "only women who are unable or unwilling to work because of pregnancy are denied benefits." This argument simply ignores the unequivocal statutory declarations that "unavailability for work of an individual shall be deemed to exist . . . [in] any case in which . . . it is found . . . [t]hat such individual's unemployment is due to pregnancy," see note 1, *supra*, and that "[s]eparation from employment because of pregnancy shall be construed as within the purview of the disqualification provided" with respect to individuals who left their employment voluntarily without good cause attributable to the employer or who were discharged for misconduct, see note 2, *supra*. When the defendants' attempt to distort the statutory language is disposed of, nothing is left of their argument and *Turner* plainly controls.

The judgment is reversed and the case is remanded to the district court with directions to determine whether it should proceed as a class action and for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

No. IP 76-705-C

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,

Plaintiffs,

v.

THE INDIANA EMPLOYMENT SECURITY BOARD, *et al.*,

Defendants.

August 10, 1978

S. Hugh Dillin, *Judge*

MEMORANDUM OF DECISION

This case comes before the Court on three motions. Plaintiffs move in the first instance to amend the complaint a second time. Plaintiffs also seek a determination that the cause be maintained as a class action.

Defendants move the Court for dismissal, alleging lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, failure to join indispensable parties, and bar by virtue of the doctrine of Sovereign Immunity and the Eleventh Amendment of the United States Constitution.

Plaintiffs' Amended Motion to Amend

The second amended complaint does not alter the substance of the alleged cause of action, and defendants do not show prejudice in their opposing memorandum.

Plaintiffs' amended motion to file a second amended complaint is therefore granted.

Defendants' Motion to Dismiss

Defendants' motion to dismiss addressed the first amended complaint. Because the two amended complaints are identical in substance, the motion to dismiss will be treated as responsive to the second complaint.

Plaintiffs maintain that they have been denied unemployment benefits under the Indiana Employment Security Act in a sexually discriminatory manner. All plaintiffs are alleged to have been separated from their employment due to pregnancy and without cause. Plaintiffs Baker, Robbins and Kuntz did not apply for unemployment benefits because of the statute in question and because of the policies of defendants in applying the statutes. Plaintiff Kubisiak attempted to apply for benefits but was not permitted to do so. Plaintiff Blocher did apply but was denied benefits.

Two statutory sections are challenged. The first reads in relevant part:

> "... unavailability for work of an individual shall be deemed to exist ... when it is found ... that such individual's unemployment is due to pregnancy ...." I.C. 22-4-14-3.

The above language was deleted from the section in 1975. P.L. 253 (1975).

The second reads as follows insofar as is relevant to this discussion:

> "Separation from employment because of pregnancy shall be construed as within the purview of the disqualification [from eligibility for unemployment compensation benefits on the ground that the applicant left her job voluntarily and without good cause] provided herein ...." I.C. 22-4-15-1.

That language has also been repealed. P.L. 262 (1977).

Thus, insofar as plaintiffs seek a declaration regarding the statutory sections, the issue is moot and requires no decision.

The question remains as to the entitlement of plaintiffs to back unemployment benefits denied them under the old sections 22-4-14-3 and 22-4-15-1. It is the opinion of this Court that plaintiffs are not so entitled.

The United States Supreme Court has spoken three times to the issue of unemployment compensation systems which deny benefits to women who stop work as a result of pregnancy.

The cause of Geduldig v. Aiello, 41 L.Ed.2d 256 (1974), is on point. In that case, the California disability insurance system was challenged insofar as it excluded from coverage certain pregnancy related disabilities. The Court upheld the California system, stating that exclusion of the disabilities was not "invidious discrimination under the Equal Protection Clause." 41 L.Ed.2d at 263.

A similar though not identical situation was addressed in General Electric Co. vs. Gilbert, 50 L.Ed.2d 343 (1976). The contention was that denial of benefits to pregnant women under an *employer's* disability plan ran contrary to Title VII of the Civil Rights Act of 1964. The Court stated explicitly that the *Geduldig* case, which arose under a Fourteenth Amendment claim, was relevant to resolving the Title VII question in *Gilbert.* The Court applied the *Geduldig* reasoning and again held that exclusion of pregnancy benefits is not discrimination based on sex unless the exclusion is shown to be a mere pretext "'designed to effect an invidious discrimination against the members of one sex or the other.'" 50 L.Ed.2d at 354 (quoting *Geduldig*). The non-discriminatory distinction must be shown to be a subterfuge. At 354.

Most recently, in the case of Nashville Gas v. Satty, 46 L.W. 4026 (1977), the Court dealt with another employer funded disability plan. Plaintiff was forced by her employer to leave work and was denied sick pay normally provided by the employer for nonoccupational sickness or injury. The Court found the sick pay system used by Nashville Gas to be indistinguishable from the insurance plan in *Gilbert,* and upheld the system based on the fact that plaintiff had not shown that the plan was used as a pretext for invidious sex discrimination. 46 L.W. at 4028.

The Indiana Employment Security Act is arguably distinguishable from either an employer or state operated disability insurance plan because it is designed to remedy economic insecurity resulting from mere unemployment, rather than to compensate disabilities which are related to unemployment. See I.C. 22-4-1-1, et seq.

A person may be disqualified for benefits under the Act if she is discharged "with just cause" or if she leaves the job "voluntarily without good cause." See I.C. 22-4-15-1.

Under the now deleted language of Section 22-4-15-1, unemployment by reason of pregnancy was deemed automatically to be departure without good cause or termination with just cause.

The relevant inquiry is therefore whether the Indiana system, which is to remedy mere lack of work, is sufficiently different from the systems in the *Geduldig, Gilbert* and *Satty* cases such as to command a different result.

This Court believes that it is not. Indiana's unemployment compensation system is financed by employer contributions. Like the other three systems, it is designed to compensate for loss occasioned by a given set of risks. Some risks are specifically excluded. For example, persons who are physically unable to work are not eligible for compensation. I.C. 22-4-14-3. Ostensibly, compensation for pregnancy related disability and lost pay could be undertaken by individual employers in their own workmen's compensation packages. However, neither the state nor private employers are constitutionally required to do so. As Justice Rehnquist stated in *Gilbert:*

> "Absent a showing that distinction involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation . . . on any reasonable basis, just as with respect to any other physical condition." 50 L.Ed.2d at 353.

Plaintiffs do not allege that the language previously in the Indiana statute operated as a pretext for invidious discrimination based on sex.

For the foregoing reasons, plaintiffs have failed to state a claim upon which relief can be granted. Defendants' motion to dismiss is hereby granted.

This decision renders unnecessary the resolution of plaintiffs' motion for determination as a class action and of the other grounds for dismissal alleged by defendants.

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

No. IP 76-705-C

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,

Plaintiffs,

v.

THE INDIANA EMPLOYMENT SECURITY BOARD, *et al.*,

Defendants.

October 27, 1978

S. Hugh Dillin, *Judge*

ENTRY

This case is before the Court on plaintiffs' motion to alter or amend and to reconsider the judgment entered on August 10, 1978. Plaintiffs contend that the Court misapplied Geduldig v. Aiello, 417 U.S. 484, 41 L.Ed.2d 256 (1974); General Electric v. Gilbert, 429 U.S. 125, 50 L.Ed.2d 343 (1976), and Nashville Gas Co. v. Satty, ——— U.S. ———, 54 L.Ed.2d 356 (1978). Plaintiffs also maintain that since the Indiana Employment Security Act has led to a denial of benefits in a sexually discriminatory manner and has created an unjustified conclusive presumption in violation of the Fourteenth Amendment's Due Process Clause, the cases of Turner v. Department of Employment Security, 423 U.S. 44, 46 L.Ed.2d 181 (1975), and Cleveland Board of Education v. LaFleur, 414 U.S. 632, 39 L.Ed.2d 52 (1974), should have been applied. Plaintiffs state that the proper inquiry is whether the Indiana system is sufficiently different from the systems in *Turner* and *LaFleur*, and not whether the Indiana system is sufficiently different from the systems in *Geduldig*, *Gilbert* and *Satty* to command a different result.

Discussion

Plaintiffs' reliance on *Turner* and *LaFleur* is in error. In *LaFleur* the school board had a rule that a pregnant teacher must take a mandatory maternity leave beginning five months before the expected birth. The teacher was required to give notice of her pregnancy at least two weeks prior to the time she was to begin her maternity leave. The teacher would not become eligible for reemployment until the beginning of the next school semester after her child was three months old, provided a physician issued a certificate attesting to the teacher's health. Justice Stewart, speaking for five members of the Court, said that the mandatory employment termination provisions contained in the maternity leave rule were violative of the Due Process Clause of the Fourteenth Amendment for two reasons. First, the rule swept too broadly in implementing both the school board's interest in continuity of instruction and the state's interest in keeping physically unfit teachers out of the classroom. Second, the rule's conclusive presumption that every pregnant teacher who reached the fifth or sixth month of pregnancy was physically incapable of continuing her job is neither necessarily nor universally true. 414 U.S. at 648, 39 L.Ed.2d at 64.

Turner involved a Utah statute which created a conclusive presumption that women are unable to work during a period of approximately eighteen weeks, extending from twelve weeks before the expected date of childbirth until six weeks after childbirth. In *Turner* the petitioner was separated from her employment for reasons unrelated to her pregnancy. She received unemployment benefits except for the eighteen week period as provided in the statute. The state's highest court had construed the statute as creating a conclusive presumption that women are unable to work during that eighteen week period. The

United States Supreme Court held that the statute violated the Due Process Clause of the Fourteenth Amendment since it could not be doubted that a substantial number of women are fully capable of working well into their last trimester of pregnancy and of resuming employment shortly after childbirth. 423 U.S. at 45-46, 46 L.Ed.2d at 183-184. The Fourteenth Amendment, the Court said, requires that unemployment compensation boards must achieve legitimate state ends through more individualized means when basic human liberties are at stake. 423 U.S. at 46, 46 L.Ed.2d at 184.

It is clear that the Indiana system is significantly different from those discussed in *Turner* and *LaFleur*. The Indiana statute, since repealed, created no presumption of a pregnant woman's inability to work. A pregnant woman was disqualified from eligibility for unemployment compensation benefits on the ground that she had left her job voluntarily and without good cause. Thus the presumption created is not one of disability but one of voluntariness or the absence of good cause. It is this point which distinguishes the Indiana system from the systems struck down in *Turner* and *LaFleur*. In a *Turner*-type situation in Indiana, a pregnant woman would likely continue to receive benefits throughout the pregnancy so long as she was available for work within the meaning of the statute. However, if her condition made her unavailable for work she would, of course, be denied benefits.

Therefore, the Court must conclude, as it did in its decision of August 10, 1978, that the Indiana system is similar to those upheld in *Geduldig*, *Gilbert* and *Satty*. The state is free to exclude pregnancy from the coverage of legislation on any reasonable basis, just as it may exclude any other physical condition. *Gilbert, supra*. Indiana creates no blanket presumption. The system merely assumes that if a woman terminates her employment because of pregnancy it is done voluntarily and without good cause. It is hard to conceive of a more reasonable basis upon which the Indiana legislature could have excluded pregnancy, an action which it is constitutionally permitted to make.

For the foregoing reasons, plaintiffs have failed to persuade the Court that its original decision was improper.

Plaintiffs' motion to alter or amend the judgment and for reconsideration is hereby denied.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-474

THE INDIANA EMPLOYMENT SECURITY BOARD, by and through its individual members, WILLIAM H. ANDREWS, GEORGE ELROD, GLENN RAY, RICHARD O. RISTINE and MAX WRIGHT, and THE REVIEW BOARD of the Indiana Employment Security Division, Unemployment Compensation Section, by and through its individual members, WILLIAM H. SKINNER, Chairman, J. FRANK HANLY, II, and RALPH F. MILES, and THE APPELLATE DIVISION of the Indiana Employment Security Division, Unemployment Compensation Section, by and through its Chief Administrator, KEITH CAMPBELL,
Petitioners

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, BARBARA KUBISIAK, LYNDA BAKER, BARBARA ROBBINS, DORIS KUNTZ, and SHERRY BLOCHER,
Respondents

BRIEF AND APPENDIX IN OPPOSITION

John A. Fillion
General Counsel, UAW
Jordan Rossen
M. Jay Whitman
Leonard Page
Associate General Counsel, UAW
8000 East Jefferson Avenue
Detroit, Michigan 48214
(313) 926-5216
Segal, Isenberg, Sales,
Stewart & Nutt
Third Floor M. E. Taylor Bldg.
Louisville, Kentucky 40202
William C. Moyer
506 State Street
P. O. Box 422
New Albany, Indiana 47150
Attorneys for Respondents

THE INLAND PRESS, DETROIT, MICHIGAN
105

INDEX

CITATIONS

Cases: *Pages*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-474

THE INDIANA EMPLOYMENT SECURITY BOARD, by and through its individual members, WILLIAM H. ANDREWS, GEORGE ELROD, GLENN RAY, RICHARD O. RISTINE and MAX WRIGHT, and THE REVIEW BOARD of the Indiana Employment Security Division, Unemployment Compensation Section, by and through its individual members, WILLIAM H. SKINNER, Chairman, J. FRANK HANLY, II, and RALPH F. MILES, and THE APPELLATE DIVISION of the Indiana Employment Security Division, Unemployment Compensation Section, by and through its Chief Administrator, KEITH CAMPBELL,
Petitioners
v.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, BARBARA KUBISIAK, LYNDA BAKER, BARBARA ROBBINS, DORIS KUNTZ, and SHERRY BLOCHER,
Respondents

BRIEF AND APPENDIX IN OPPOSITION

The Respondents[1], International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Barbara Kubisiak, Lynda Baker, Barbara Robbins, Doris Kuntz, and Sherry Blocher, by their counsel, respectfully pray that this Court *deny* the Petition for Writ of Certiorari.

[1] Petitioners may be referred to as defendants and Respondents may be referred to as plaintiffs. Petitioners' and Respondents' Appendices will be respectively cited as (A-1, etc.) and (2b, etc.)

OPINIONS BELOW

The Opinion of the Seventh Circuit (A-1) appears at 600 F.2d 118. The Memorandum of Decision and the Entry by the United States District Court for the Southern District of Indiana, Indianapolis Division (hereinafter "District Court") in response to Plaintiffs' Motion to alter or amend the Judgment and for Reconsideration are reproduced. (A-5 and A-10)

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Does the Petition raise important substantive issues where: 1) this Court decided the substantive issues in 1975; 2) a 1976 federal statute compelled all states to follow this Court's 1975 ruling; and 3) Indiana repealed its unlawful statutes in 1975 and 1977?

2. Did the Court of Appeals correctly hold that plaintiffs stated a cause of action and that plaintiffs' Complaint should not have been dismissed on the pleadings?

3. Did the Court of Appeals correctly hold that defendants acted unlawfully when the undisputed factual allegations were that plaintiffs were forced out of their jobs due to pregnancy, when they were able to and wanted to work, and that defendants then refused to consider their unemployment insurance claims and presumed plaintiffs ineligible for unemployment insurance solely because they were pregnant?

4. Is this action barred by the Eleventh Amendment to the United States Constitution where: 1) if the individual plaintiffs and others establish their claims, they may receive unemployment compensation, which would be paid from a separate fund financed by federal and state payroll taxes and not paid from the Indiana Treasury; 2) defendant State officials have been ordered to consider, hear, and reconsider and rehear unemployment compensation claims of plaintiffs and others; and 3) this suit is brought by Indiana citizens under the Fourteenth Amendment to the Constitution of the United States.

COUNTER STATEMENT OF THE CASE

A Counter Statement of the Case is needed because Petitioners' "Statement of the Case" includes argument, irrelevant material not in the record, and other omissions and inaccuracies.

The individual plaintiffs[2] are women who were forced to leave their jobs because they were pregnant at a time when they were physically able to work and wanted to work. (A-6; A-1 and A-3) Defendants, acting under two former Indiana statutes, refused to let one plaintiff file for state unemployment compensation and automatically denied unemployment compensation to other plaintiffs, although plaintiffs in fact had not voluntarily left their jobs and were able and available to work. See Complaint and Amended Complaints (2b-5b, 8b-10b) and the lower Court Opinions. (A-6; A-1 and A-3)

Indiana Code §22-4-14-3 (Burns 1974, tit. 22, pp. 428-429) repealed in relevant part, Pub. L. 253 §1, 1975, provided in part:

---

[2]The International Union, UAW, also sued individually as an employer-contributor to the Employment Security Fund, and on behalf of its members and others who did not receive unemployment compensation benefits because they were pregnant.

"An unemployed individual shall be eligible to receive benefits with respect to any week only if he is physically and mentally able to work, is available for work and is found by the division to be making an effort to secure work. . . For the purpose of this article [22-4-1-1—22-4-38-3], *unavailability for work of an individual shall be deemed to exist* but shall not be limited to, *any case in which,* with respect to any week, *it is found:*

. . . (d) *That such individual's unemployment is due to pregnancy. . .*" (Emphasis ours)

Indiana Code §22-4-15-1 (Burns 1974, tit. 22, pp. 434-436), repealed in relevant part, Pub. L. 262, §24, 1977, provided in part:

" *A]n individual shall be ineligible for* any waiting period or *benefit rights based upon wages earned from any employer whose employ he has left voluntarily* without good cause attributable to the employer or from which he has been discharged for misconduct in connection with his work: Provided, however that . . . [*s*]*eparation from employment because of pregnancy shall be construed as within the purview of the disqualification provided herein. . .*" (Emphasis ours)

Plaintiffs began this suit on December 8, 1976. Amended Complaints were filed on January 6, 1977 and April 28, 1977. (2b, 3b)

Plaintiffs do not ask for damages against defendants. Plaintiffs seek to have their unemployment compensation claims considered and that they be paid compensation from the separate unemployment compensation funds for the periods when they were forced out of work and when they were physically able and available to work. (8b, 10b)

Defendants filed a Motion to Dismiss in February, 1977. On July 24, 1978, the District Court granted plaintiffs' motion to compel defendants to produce documents. (11b-13b) While this discovery was proceeding, the District Judge dismissed plaintiffs' complaints on August 10, 1978. (A-5 to A-9) a) The Judge denied plaintiffs' post-dismissal motions in October, 1978. (A-10 to A-13).

Although plaintiffs' factual allegations were unchallenged in District Court, defendants argued in their Court of Appeals Brief and in its Petition to this Court that defendants did not really apply said Indiana statutes as they are written. Defendants' argument is false and is not supported by the factual record.

In the Court of Appeals, defendants failed to raise their Eleventh Amendment argument. It was not considered by the lower Court. Their Petition urges that this Court now consider this issue.

The Court of Appeals for the Seventh Circuit reversed the dismissal of plaintiffs' complaints and held that the former Indiana statutes, as applied by defendants, denied property to plaintiffs without due process of law in violation of the Fourteenth Amendment to the United States Constitution.[3] (A-1 to A-4)

SUMMARY OF ARGUMENT

This case is not important because federal law was changed in 1976 to clearly bar the practices under the two laws which Indiana repealed in 1975 and 1977. This Court decided the substantive issues in 1975.

---

[3] The Court of Appeals did not rule upon other grounds for relief, including that the State impeded Title VII of the 1964 Civil Rights Act by rewarding employers, which unlawfully forced out women because they were pregnant. (Counts II and III; 9b)

The Court of Appeals correctly reversed the District Judge's dismissal of plaintiffs' Complaints, because they alleged undisputed facts, which entitled plaintiffs to relief. The Court of Appeals correctly held that the Indiana Statutes unlawfully denied unemployment compensation to pregnant women, who were forced out of work, by conclusively presuming that they had voluntarily left and that they were unable to work although in fact such women wanted to work and were able and available to work.

The Court of Appeals decision is in accord with decisions of this Court, with the decisions of other Circuit Courts, which have considered the issue, and with the decisions of other federal and state courts.

Petitioners' argument that the Eleventh Amendment bars relief in this case was not raised in the Court of Appeals and was not considered by the lower Court. This issue should not now be dealt with by this Court. Such argument is also meritless because: 1) unemployment compensation is not paid from the State Treasury but is paid from a separate fund financed by federal and state taxes on employers; 2) defendants have been ordered to consider and hear unemployment compensation claims and to pay them, from said separate fund, if plaintiffs and others show that they were forced out of work when they were able and available to work; and 3) this action is brought by Indiana citizens under 42 U.S. Code Section 1983, and Section 5 of the Fourteenth Amendment to the U.S. Constitution and because defendants impeded or violated other federal laws. (2b-11b)

ARGUMENT

I.

THIS PETITION RAISES NO IMPORTANT SUBSTANTIVE ISSUES: THIS COURT RECENTLY DECIDED THESE ISSUES; A FEDERAL STATUTE NOW EXPRESSLY PROHIBITS WHAT INDIANA WAS DOING; AND INDIANA REPEALED ITS UNLAWFUL STATUTES.

A. This Court Has Recently Held That It is Unlawful To Deny Unemployment Compensation To Pregnant Women Who Are Able To Work; That Ruling Was In Accord With Prior Federal Decisions.

This Court and other courts hold that it is unlawful to deny unemployment compensation to a woman who was forced out of work due to pregnancy, without regard for such woman's individual ability to work. *Turner* v. *Dept. of Emp. Sec. of Utah,* 423 U.S. 44 (1975). This Court stressed that pregnant women cannot automatically be denied unemployment compensation for fixed periods of time. (at 46) Eligibility for compensation must depend upon each woman's individual circumstances. In this case, the State had automatically denied compensation to pregnant women by presuming them unavailable for work.

Prior to *Turner, supra,* other courts had held that it was unlawful to deny unemployment compensation to women due to pregnancy.[4]

B. Changes In Indiana and Other State Laws And Recent Federal Law Changes Make This Case Even Less Worthy Of This Court's Review.

In 1970, the Department of Labor advised the States to eliminate special pregnancy disqualifications from their

[4] See Argument II *infra* at pages 9 to 12.

unemployment insurance laws. (21b, 22b). As a result of that letter and various federal and state court decisions and State Attorney General Opinions, the states began eliminating such provisions, which treated unemployed pregnant women different than others who could work.[5] *Turner* hastened these changes. And see the post-*Turner* Department of Labor Letter No. 1-76. (16b-21b)

In 1976, Congress reflected the case law by expressly providing that states may not deny unemployment insurance to pregnant women.[6]

The State of Indiana eventually followed federal laws and repealed the pregnancy provisions in its statutes in 1975 and 1977.

This Court denied *certiorari* in *Firestone* v. *Taylor,* 435 U.S. 970, (1978). This suit was based upon the lower Court rulings in that case. (2b, 3b) While such denial is not precedential, Respondents mention it and note that these issues have not become more important since 1978.

[5]Among the States which had directly or indirectly discriminated against pregnant women since 1971, at least 34 states have eliminated pregnancy exclusions in their statutes and six have replaced time limit exclusions with provisions disqualifying pregnant women while actually disabled. "The impact of the Equal Rights Principle on State Unemployment Compensation Laws, by Brown, Freedman, Katz and Price; Women and the Law Symposium on Sex Discrimination, unpublished materials (Mar. 1976), citing in part the December 1970 U.S. Dept. of Labor Letter (21b), a chart by Margaret Dahm, published in U.S. Dept. of Labor Benefit Series Service, Un. Ins., Rept. 304, (Sept. 1975; Intl. Women's Year Special Supplement)

[6]The Federal Unemployment Tax Act, 26 U.S.C.A. Sec. 3304(a)(12), as amended by Pub. Law 94-566 (Addendum, p. 15b)

II.

THE COURT OF APPEALS CORRECTLY REVERSED DISMISSAL OF PLAINTIFFS' COMPLAINTS. THE COURT OF APPEALS CORRECTLY HELD THAT THE CHALLENGED SECTIONS OF THE INDIANA EMPLOYMENT SECURITY ACT ERECTED IRREBUTABLE PRESUMPTIONS IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The District Judge granted defendants' motion to dismiss plaintiffs' Complaints for failure to state a claim upon which relief can be granted. (A-9) The Court of Appeals correctly reversed such dismissal. (A-1 to A-4)[7]

The two former Indiana Statutes, on their face, unlawfully denied unemployment compensation to workers, who were forced out of work due to pregnancy, by conclusively presuming that such separations were "voluntary and without good cause" and by conclusively presuming that such women were unavailable for work. (A-3; and see statutes quoted *supra* at p. 4). The undisputed facts in the Complaints alleged that such statutes were applied to deny compensation to women who in fact had not voluntarily left their jobs and who were physically able to work and were available for work. (A-1, A-3, A-6; 3b-5b, 8b-10b)

Plaintiffs seek no unemployment benefits for any pregnant woman who in fact voluntarily quit her job without good cause or for any pregnant woman who is unwilling or unable to seek new employment.[8] (A-1, A-2) Plaintiffs

[7]*Scheurer* v. *Rhodes,* 416 U.S. 232, 236 (1974); *Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957).

[8]Indiana's statute, and all other state unemployment insurance statutes, exclude claimants who are unable to or unavailable for work and who quit their jobs. Thus, the special pregnancy provisions affect women who are physically able to work and who want to work.

seek only the opportunity, assured all other workers, to demonstrate at hearings before the defendant agencies that they were forced to leave their jobs and that they were ready, willing and able to continue working. (10b)

The decision of the Court of Appeals is not only consistent with but required by a previous decision of this Court. *Turner* v. *Dept. of Employment Security of Utah,* 423 U.S. 44 (1975). In *Turner,* this Court relied upon *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974).

In *Turner,* this Court declared:

> "It cannot be doubted that a substantial number of women are fully capable of working well into their last trimester of pregnancy and of resuming employment shortly after childbirth." (at 46)

This Court decided that the conclusive presumption of incapacity in the Utah statute, which was less severe and was applied for a shorter period of time than the presumptions at issue here, "is constitutionally invalid . . ." *Id.,* at 46.

The Court of Appeals here based its decision on *Turner* and held:

> "A state statute that denies unemployment benefits to all women who are unemployed because of pregnancy without regard to whether individual pregnant women have the physical capacity to continue work is invalid under that holding." (A-3, A-4)

The Court of Appeals rejected the argument that these statutes do not incorporate a conclusive presumption of incapacity, stating that the relevant statutes are "unequivocal statutory declarations." (A-4.)

The Seventh Circuit's decision is in accord with the decisions of other federal and state courts.[9]

Petitioner argues that the Court of Appeals decision conflicts with *Geduldig* v. *Aiello,* 417 U.S. 484 (1974); *General Electric Co.* v. *Gilbert,* 429 U.S. 125, reh. den. 429 U.S. 1079 (1976); and *Nashville Gas Co.* v. *Satty* ,434 U.S. 136 (1977).

The Court of Appeals correctly held that those cases do not apply. None of these cases involved the due process issue central to *LaFleur, Turner* and the case at bar. *Geduldig,* which predates *Turner,* was an equal protection challenge; both *Gilbert* and *Satty* were decided solely under Title VII of the Civil Rights Act of 1964.[10]

There is, however, a more basic, overriding difference. *Geduldig, Gilbert,* and *Satty* involved decisions by a public authority or a private employer, to exclude from disability or sick leave coverage one type of disability, pregnancy. The women challenging that exclusion were in fact disabled.

---

[9] *Jordan* v. *Meskill, et al.,* ..... F. Supp. ....., 1A CCH Unempl. Ins. Rep. Fedl. ¶21,420 (D. Conn. No. 15671, 1973), reproduced in the Addendum, pp. 27b-32b), affirmed in part and remanded on the issue of attorneys' fees sub nom, *Jordan* v. *Fusari,* 496 F. 2d 646 (2d Cir. 1974); *Cf. UAW, et al* v. *Taylor, et al,* (E.D. Mich. No. 4-70066, 1975), affirmed .... F.2d .... (6th Cir. No. 76-1474, Nov. 16, 1977) reproduced in Addendum (22b-27b), cert. den. sub nom, *Firestone* v. *Taylor, et al,* 435 U.S. 970 (1978).

In *Lasko* v. *Garnes,* .... F. Supp. ...., 1A CCH Unempl. Ins. Rep. Fed ¶21,421 (N.D. Ohio, 1973), a scheme similar to I.C. 22-4-15-1 was found unconstitutional as applied to women involuntarily terminated due to pregnancy. Leaving the statute intact as applied to women who in fact left voluntarily due to pregnancy, the court held that the complainants must be afforded an opportunity to demonstrate they were fired or that maternity leave was forced on them. (32b-37b) That opportunity has been denied to Indiana women.

See also *Hanson* v. *Hutt,* 83 Wash. 2d 195, 517 P. 2d 599 (1973); and *Sylvara* v. *Industrial Comm.,* .... Colo. ...., 550 P. 2d 868, 870 (1976).

[10] Since amended specifically to overcome the result in Gilbert (P. L. 95-555, enacted October, 1978).

They wanted their *disability due to pregnancy* to count in the benefit programs.

Here, as in *Turner,* plaintiffs do not seek any benefits because of pregnancy. Plaintiffs ask that regular unemployment compensation, to which they were entitled not be denied to them because of their pregnancies. As in *Turner,* plaintiffs rely on their ability, i.e., they claim their fitness to work is unaffected by their pregnancy. They maintain they are involuntarily unemployed and available for work. (A-1, A-3, A-6; 3b-5b, 8b-10b)

In this case, defendants imposed additional financial burdens on women who were unlawfully forced out of work due to pregnancy. *Nashville Gas Co.* v. *Satty,* 434 U.S. 136 (1977), clarified that the practices relating to seniority and leave policies which discriminate due to pregnancy, are not condoned by the decision in *Gilbert.*[11]

---

[11] After this Court's decision in *General Electric Co.* v. *Gilbert,* 429 U.S. 125, the Equal Employment Opportunity Commission issued revised guidelines, No. 915 dated December 300, 1976 (Addendum, 15b). In those guidelines, the EEOC stated in part as follows:

> "6. The Commission has determined that distinctive treatment of pregnancy or maternity in the following situations continues to be unlawful because these criteria have a disproportionate impact on women and are therefore gender based or are by their terms gender based:
>
> d. mandatory maternity leaves for predetermined time periods.
>
> e. dismissals of pregnant women
>
> f. denials of reemployment rights to women on leave for pregnancy-related reasons
>
> g. denials of unemployment benefits to pregnant women"

III.

THIS CAUSE IS NOT BARRED BY THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioners did not raise this issue in the Court of Appeals. This issue was not decided by either lower Court. It should not now be considered by this Court.[12]

The Eleventh Amendment does not bar the relief requested by plaintiffs.

First, unemployment compensation is not payable out of state funds but out of a separate fund, which is financed by federal and state taxes on employers.

The Indiana Employment Security Law[13] provides in part:

> "Sec. 22-4-2-9. *"Fund" means the Employment Security Fund, established by* IC 1971, 22-4-26-1, in which all *contributions* required, all *payments* in lieu of contributions *and all money received from the Federal government* as reimbursements pursuant to section 204 of the Federal-State Extended Compensation Act of 1970, 26 U. S. C. A. 3304n, shall be de-

---

[12] As this Court noted in *Adickes* v. *S. H. Kress and Co.,* 398 U.S. 144 (1970):

> ". . . petitioner never raised any issue concerning the 1875 statute before the Court of Appeals. Accordingly, the Second Circuit did not rule on these contentions. Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them. *Lawn* v. *United States,* 355 US 339, 362-363, n. 16, (1958); *Husty* v. *United States,* 282 US 694, 701-702, (1931); *Duignan* v. *United States,* 274 US 195, 200, (1927). We decline to do so here" (at 147, note 2)

See also *Bivens* v. *Six Unknown Named Agents of Fedl. Bureau of Narcotics,* 403 U.S. 388, 397, 398 (1971).

[13] Indiana Laws, as amended by Ch. 355, L. 1971; Ch. 239, L. 1973. These are reproduced in the Addendum (13b-15b) and appear in 4 CCH Un. Ins. Reps. Ind. Paras. 4010, 4124 and 4125.

posited and *from which all benefits provided under this article shall be paid.*" (Emphasis ours)

• • •

"Sec. 22-4-26-1. There is hereby established a special fund to be known as *the Employment Security Fund which shall be administered separate and apart from all public monies or funds of the state.* • • •" (Emphasis ours)

Sec. 22-4-26-2. *The Fund shall be administered exclusively for the purpose of this Act,* and monies withdrawn therefrom, except for deposit in the Unemployment Trust Fund and for refund, as provided in this Act, and except for amounts credited to the account of this State pursuant to Section 903 of the Social Security Act, as amended, which shall be used exclusively as provided in Section 2705 hereof, shall be used solely for payment of benefits. • • •" (Emphasis ours)

When the state funds have been inadequate to meet the claims, the states have simply not paid unemployment compensation or have borrowed money from the federal government. This was done by many states in the 1974-1976 recession.[14]

Petitioners falsely state that recovery will come from public funds derived from the State Treasury. This incorrect statement is not supported by any facts or pleadings. Accordingly, *Ford Motor Co.* v. *Department of Treasury of State of Indiana,* 323 U.S. 459 (1945) does not apply.

In *Edelman* v. *Jordan,* 415 U.S. 651, (1974) this Court explicated the meaning of the Eleventh Amendment in the context of a suit brought against the administrators of a public assistance program by welfare applicants challenging the constitutionality of certain regulations. The Court

[14] These facts and the Indiana laws (note 13) are not in the record of this case because this issue was not litigated in the lower Court.

held that ". . . a suit by private parties seeking to impose a liability *which must be paid from public funds in the state treasury* is barred by the Eleventh Amendment," (at 663 (citations omitted); (emphasis added). The underlying rationale of the *Edelman* decision dictated that judicial focus be on the impact on the state treasury. This was emphasized by Justice Stevens concurring in *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976) where he stated: "Its actual holding [of *Edelman*] appears to be limited to the situation in which the award is payable directly from state funds and 'not as a necessary consequence of compliance in the future' with a substantive determination, 415 U.S. at 668." (427 U.S. at 459)

This interpretation comports with the "alter-ego" line of cases which exempt from Eleventh Amendment application, suits against public agencies or instrumentalities where the funds from which an award will be taken are "self-sustaining and financially independent of the state" *Bowen* v. *Hackett,* 387 F. Supp. 1212 at 1218 (D.R.I., 1975), and see cases cited in footnote 7 therein. *Bowen* itself involved an action to challenge the constitutionality of certain state unemployment compensation and temporary disability insurance laws relating to dependency determinations. In deciding whether the Eleventh Amendment barred the payment of retroactive benefits unlawfully denied to plaintiff class members, the court stated that it "must look only to the narrower inquiry as to whether a judgment having a direct impact on these funds constitutes a suit against the state, i.e., to be paid 'from public funds in the state treasury' in the context of the Eleventh Amendment" 387 F. Supp. at 1220. The Court further stated:

> "There has developed a clear line of judicial authority which has held that if the legislature has

> intentionally insulated the treasury of the state from any liabilities that a particular financially, self-sustaining instrumentality might incur, that instrumentality does not constitute the 'alter ego' of the state and suit against such a body or its officers is not barred by the Eleventh Amendment." 387 F. Supp. at 1220 (citations omitted)

Indiana also has insulated its Treasury from the payment of unemployment compensation. Compare with Rhode Island. *Ibid* at 1217.

The Court went on to note several factors relevant to the judicial inquiry: the funds in question were not the product of legislative appropriation; they were segregated from the general revenues of the state; and there was no legal duty of the state to replenish the unemployment compensation funds with money from the general revenues for operation of the program. The most important factor is "whether payment of a judgment will have to be made out of the state treasury, i.e., whether the fund in question has both the independent power and resources to pay the judgment without further action by the state legislature or other governmental officer or entity." 387 F. Supp. at 1221 (citations omitted). Since, in *Bowen,* the fund could "pay the judgment without further action by the state legislature," the Court concluded there was no Eleventh Amendment bar to the action. The analysis employed in *Bowen,* including the relevant factors articulated therein has has been followed in other cases[15] and comports with this Court's holdings.

Second, plaintiffs request prospective relief of the type which this Court upheld in *Quern* v. *Jordan,* ..... U.S. ....., 59 L.E. 2d 358, 371 (1979), affirming *Jordan* v. *Trainor,* 551 F. 2d 152 (7th Cir. 1977). These cases are sequels to *Edelman* v. *Jordan,* 415 U.S. 651, 677 (1974).

[15] See, for example: *Hander* v. *Jacinto Junior College,* 519 F. 2d 273 at 278 (5th Cir. 1975), rehearing and rehearing *en banc* denied, 522 F. 2d 204 (1975); and *Doris Trading Corp.* v. *S. S. Union Enterprise,* 406 F. Supp. 1093 at 1095 (SD NY 1976).

In *Jordan* v. *Trainor,* the Court of Appeals objected to a District Court notice which stated the amount to be paid to each class member *from state funds.* (551 F.2d at 154) That type of future proceeding "would automatically result in payment of state funds." (*Ibid*).

In this case, individual plaintiffs would have to apply or re-apply for unemployment compensation, show that they were forced out of work due to pregnancy, and that they were able and available to continue working. (4b, 8b, 10b) The plaintiffs would only be entitled to compensation from the time they were forced out until they physically could not work and then, after delivery, for the weeks when they wanted to resume work and were again able to and available for work. (Prayers B. and D.; 10b)

Such future proceedings would not result in the automatic payment of any specific amounts of compensation. Moreover, no compensation would be paid out of state funds. See *Edelman, supra,* 415 U.S. at 677.

This relief is similar to that granted in *California Dept. of Human Resources* v. *Java,* 402 U.S. 121 (1971). It is identical to the relief granted in *UAW et al* v. *Taylor, et al* and in *Jordan* v. *Meskill.* (23b; 29b-32b)[16]

Finally, the Eleventh Amendment should not protect state officials from actions brought under Section 5 of the Fourteenth Amendment. *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 456 (1976).[17]

[16] These District Court Orders are reproduced in the Addendum. The full cites of these cases appear *supra* in note 9, page 11.

[17] See also Mr. Justice Brennan's concurring opinion in *Quern* v. *Jordan,* .... U.S. ...., 59 L.E. 2d 358, 373.

CONCLUSION

For the foregoing reasons, this Court should *deny* the Petition.

Respectfully submitted,
John A. Fillion
General Counsel,
International Union, UAW
Jordan Rossen
M. Jay Whitman
Leonard Page
Associate General Counsel,
International Union, UAW
By: /s/ Jordan Rossen[18]
8000 East Jefferson Avenue
Detroit, Michigan 48214
(313) 926-5216
Segal, Isenberg, Sales,
Stewart & Nutt
By: /s/ Herbert L. Segal
Irwin M. Cutler, Jr., and
Carol M. Raskin
Third Floor M. E. Taylor Bldg.
Louisville, Kentucky 40202
William C. Moyer
506 State Street
P. O. Box 422
New Albany, Indiana 47150
Attorneys for Respondents

Dated: October 15. 1979

[18] Work on parts of the Brief was done by M. Elizabeth Bunn of Zwerdling and Maurer, Isabelle Katz Pinzler of the American Civil Liberties Union Foundation Women's Project, and by UAW Legal Department law clerks Lecia Eason, Kevin Kozma, Paula Weinbaum and John Willems as supervised by UAW counsel.

INDEX OF APPENDIX

INDEX OF ADDENDUM

COMPLAINT

(Filed December 8, 1976)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
AT INDIANAPOLIS
NO. IP 76-705-C

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, BARBARA KUBISIAK, LYNDA BAKER, BARBARA ROBBINS, and DORIS KUNTZ,

PLAINTIFFS

VS.

THE INDIANA EMPLOYMENT SECURITY BOARD, by and through its individual members, WILLIAM H. ANDREWS, GEORGE ELROD, GLENN RAY, RICHARD O. RISTINE and MAX WRIGHT
Ten North Senate
Indianapolis, Indiana 46204

DEFENDANTS

• • •

Plaintiffs, by counsel, state the following:

COUNT I

• • •

[Text is omitted because Second Amended Complaint substitutes for Complaint]

(Title of Court and Cause)
AMENDED COMPLAINT
(Filed January 6, 1977)

• • •

No responsive pleading having been filed by the Defendands, Plaintiffs hereby amend their Complaint as a matter

of course pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, for the purposes of naming additional parties Defendants, and correcting a typographical error.

• • •

[Text is omitted]

(Title of Court and Cause)
SECOND AMENDED COMPLAINT
(Filed April 28, 1977)

Come the Plaintiffs, by counsel, and for their Second Amended Complaint, state as follows:

COUNT I
The Parties

1. Plaintiff, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, hereinafter referred to as UAW, whose regional office is in Indianapolis, Indiana, is the recognized or certified bargaining representative of approximately 125,000 employees in Indiana, including numerous women who are employees within the meaning of the Indiana Employment Security Act. Agents of the UAW are frequently authorized by individual members and others to present their claims for unemployment compensation benefits to appropriate administrative agencies. In addition, UAW is an Indiana employer, and, as such, contributes to the Indiana Employment Security Fund.

2. Plaintiffs, Barbara Kubisiak, Lynda Baker, Barbara Robbins, Doris Kuntz, and Sherry Blocher, are employees who were separated from employment due to pregnancy and without cause on or about the following dates: June, 1968 and March, 1971 in the case of Mrs. Kubisiak; November 2, 1974 in the case of Mrs. Baker; October, 1975 in the

case of Mrs. Robbins; September, 1973 in the case of Mrs. Kuntz; and June 3, 1977 in the case of Mrs. Blocher. Plaintiffs Baker, Robbins and Kuntz did not apply for unemployment benefits because of the statutes described hereinbelow or because of the policy of the Defendants (or their predecessor in office) complained of in this action. Plaintiff Kubisiak attempted to apply for unemployment benefits and was not permitted to do so by a local office representative of the Defendants. Plaintiff Blocher applied for and was denied unemployment compensation benefits on the grounds, among others, that she was not considered able and available for work during her pregnancy leave.

3. Defendants, William H. Andrews, George Elrod, Glenn Ray, Richard O. Ristine and Max Wright, who compose the Indiana Employment Security Board, directly, and through the subdivisions and agents of the Indiana Employment Security Division, of which said Board is in charge, administer the Indiana Employment Security Act and make determinations of eligibility for unemployment compensation benefits. As members of said Board, Defendants in their official capacity do, and are charged with the responsibility to, oversee the administration of the Indiana Employment Security Act; pursuant to this responsibility, said Defendants promulgate regulations setting standards of eligibility for unemployment compensation benefits and have the ultimate administrative power to determine the eligibility of a given applicant.

4. Defendants, William H. Skinner, J. Frank Hanly, II, and Ralph F. Miles, compose the Review Board of the Indiana Employment Security Division, Unemployment Compensation Section, also named as Defendants in this case and are charged in their official capacity with hearing appeals from the decisions of claims-hearing referees as to the eligibility of applicants for unemployment compensation benefits. The decisions of these parties create precedent which is followed by the referees in determining eligibility of applicants.

5. The Defendant, Keith Campbell, Chief of the Appellate Division of the Indiana Employment Security Division, Unemployment Compensation Section, also named as Defendant herein, is charged with the administration of hearings concerning the eligibility of applicants for unemployment insurance benefits. In this capacity, said Defendant appoints referees for hearings, and arranges for the times and places of hearings.

Class Action Allegations

6. The UAW brings this action individually as an employer-contributor to that fund, and on behalf of its members who were denied or failed to receive unemployment compensation benefits because of the unlawful discrimination by Defendants against pregnant women.

7. Plaintiffs Kubisiak, Baker, Robbins, Kuntz and Blocher bring this action individually and on behalf of a class of persons including all others similarly situated, namely, all women who have not sought unemployment compensation because of the statutes described hereinbelow or because of the policy of Defendants (or their preedecessors in office) not to grant unemployment compensation to women separated from employment because of pregnancy and all women who have been denied unemployment compensation benefits either on the ground that they were conclusively presumed unavailable for work because they were unemployed due to pregnancy or on the ground that they were

conclusively deemed to have voluntarily left their jobs without good cause when separated from employment because of pregnancy.

8. Each of the classes or groups of persons described in Paragraphs 6 and 7 above, is so numerous (numbering thousands of persons) that joinder of all in the class is impracticable; there are questions of law and fact common to each class which predominate over any individual questions (namely, the questions of the constitutionality of certain Indiana statutes set out hereinbelow); the claims of the representative parties are typical of the claims of the respectiive classes; the representative parties will fairly and adequately protect the interests of the class (in that they have a personal interest in the outcome of this litigation and are represented by competent and experienced counsel); and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The prosecution of separate actions by individual members of the class would create a risk of both inconsistent or varying adjudications with respect to the individual members of the class which would establish incompatible standards of conduct for the party opposing the class, and adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications, substantially impairing or impeding their ability to protect their interests, and in addition, the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Nature of Action

9. Plaintiffs bring this action to recover unpaid unemployment compensation benefits, and for declaratory, injunctive, and other relief, under 42 USC §1983, 28 USC §2281, 28 USC §§2201 and 2202, 42 USC §§501 *et seq.* and in particular 42 USC §§503(a)(1) and 503(b)(2), as well as regulations promulgated pursuant to thes statutes, 42 USC §2000e-2, and the Fourteenth Amendment to the United States Constitution, as hereinafter more fully appears.

10. The individual Plaintiffs and members of the classes they represent will suffer irreparable injury unless granted injunctive relief, in that they will otherwise be unable to receive the unemployment insurance benefits to which the law entitles them, the economic security which such benefits yield, and the rights guaranteed by the Federal Constitution and various Federal Statutes.

Jurisdiction

11. Jurisdiction is conferred on this Court by the statutory sections listed in paragraph 9 above, and by 28 USC §§1343 and 1331.

Cause of Action

12. Indiana Code 22-4-15-1, part of the Indiana Employment Security Act, provides in part as follows and has so provided at all times relevant to this action:

> "Separation from employment because of pregnancy shall be construed as within the purview of the disqualification [from eligibility for unemployment compensation benefits on the ground that the

applicant left his or her job voluntarily and without good cause] provided herein. . . ."

13. Prior to April 11, 1975, Indiana Code 22-4-14-3 provided that where an "individual's unemployment is due to pregnancy", that individual shall be deemed unavailable for work and, because unavailable for work, ineligible for unemployment compensation benefits.

14. Upon information and belief, Defendants, acting in their official capacity, have denied or failed to grant unemployment compensation benefits to the individual Plaintiffs and members of the classes Plaintiffs represent and will continue to do so unless otherwise ordered by this Court; such denial has been and will be pursuant to the statutory provisions recited in paragraphs 12 and 13, above, solely because the Plaintiffs were pregnant women, or because of unjustified conclusive presumptions concerning pregnant women.

15. The statutory provisions recited in Paragraph 12 and 13 above, and the Defendants' action described in Paragraph 14 above, violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, in that they discriminate against women who are pregnant or capable of becoming pregnant without a rationale basis.

16. The statutory provisions recited in Paragraph 12 and 13 above, and the Defendants' actions described in Paragraph 14 above, violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution in that they create or are based upon conclusive presumptions that pregnant women either left their jobs voluntarily and without good cause, or are unavailable for work.

COUNT II

17. Plaintiffs reallege the allegations contained in Paragraphs 1-14, above in Count I, and hereby incorporate them into Count II of this Complaint.

18. The statutory provisions recited in Paragraphs 12 and 13, above, and the Defendants' actions described in Paragraph 14 above, violate 42 USC §§503(a)(1) and (b)(2), which require that the United States Secretary of Labor shall make no certification for payment to a state of unemployment compensation funds where the state's methods of administration fail to insure payment of the benefits when due; said statutes and actions also violate the purposes of 42 USC §§501 *et. seq.*, which include, among other purposes, the assurance of economic security to employees forced out of work.

COUNT III

19. Plaintiffs reallege the allegations contained in Paragraphs 1-14, above in Count I, and hereby incorporate them into Count III of this Complaint.

20. The statutory provisions recited in Paragraphs 12 and 13, above, and the Defendants' actions described in Paragraph 14 above, impede the purposes of, and therefore, violate, Title VII of the 1964 Civil Rights Act, particularly 42 USC §2000e-2 thereof in that they encourage employers to discharge pregnant women on the basis of sex, in violation of said Title VII, by failing to charge employers for unemployment compensation payments upon discharge of pregnant women without cause while charging employers for unemployment compensation payments to other employees discharged without cause.

WHEREFORE, the Plaintiffs respectfully demand the following:

A. That this Court find this a class action under Rule 23(b)(1) and (2) of the Federal Rules of Civil Procedure.

B. That the Court issue its permanent injunction enjoining the Defendants, their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, from further denying unemployment compensation benefits to women solely on the grounds either of pregnancy or of conclusive presumptions that pregnant women are unavailable for work or have left their work without good cause;

C. That the Court issue its Declaratory Judgment declaring, adjudicating and decreeing that the statutory provisions recited in Paragraphs 12 and 13, above, are invalid as violative of the Social Security Act, particularly, 42 USC §503(a)(1) thereof, the Civil Rights Act, particularly 42 USC §2000e-2 thereof, or the Fourteenth Amendment of the United States Constitution, or all of the above;

D. That Defendants be ordered to pay from the Indiana Employment Security Fund to the individual Plaintiffs, and to all entitled members of the class they represent, all unemployment compensation benefits to which they are or were entitled but were denied by the unlawful actions and statutory provisions heretofore detailed, with interest until paid, for the period or periods during which they were physically able to work, provided that said Plaintiffs show only that they were physically able to work during said periods of time.

E. That Plaintiffs recover their costs herein expended,

including reasonable attorney's fees, and have all other relief to which the Plaintiffs may be entitled.

SEGAL, ISENBERG, SALES,
STEWART & NUTT
By: /s/ IRWIN H. CUTLER, JR.
HERBERT L. SEGAL
IRWIN H. CUTLER, JR.
Third Floor M.C. Taylor Bldg.
Louisville, Kentucky 40202
Telephone: (502) 587-8885
/s/ WILLIAM C. MOYER
506 State Street
P.O. Box 422
New Albany, Indiana 47150
Telephone: (812) 948-1195

(Title of Court and Cause)

INJUNCTION IN AID OF DISCOVERY
AND ORDER GRANTING MOTION TO COMPEL
(July 24, 1978)

This cause having come before the Court on Plaintiffs' Application for a Temporary Restraining Order on notice to Defendants, and on Plaintiffs' Motion to Compel, and the Court having considered the entire file herein including Defendants' objection to Plaintiffs' Request for Production of Documents and Plaintiffs' Motion to Compel and memoranda in support thereof, and the Court being advised, it being shown by the Affidavits of Irwin H. Cutler, Jr., that the Defendants may on July 24, 1978, destroy certain documents which are the subject of a Request for Production of Documents, which documents may contain evidence bearing on the issues raised by the pleadings

herein, and it appearing that the Plaintiffs may suffer immediate and irreparable injury, harm and damage by the Defendants' destruction of said documents in that they may contain evidence which is relevant to Plaintiffs' case, and the Court having determined that Plaintiffs are entitled to an Order in aid of discovery,

IT IS HEREBY ORDERED that the Defendants, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, who receive actual notice of this Order by personal service or otherwise, are hereby enjoined and restrained from destroying the following documents, except as set out hereinbelow:

1. All decisions of appeals referees interpreting or applying Indiana Code 22-4-15-1 and Indiana Code 22-4-14-3 and any other statutory provisions relating to pregnancy of claimants for unemployment compensation from June, 1968, to the present.

2. All initial determinations made by local office personnel interpreting or applying Indiana Code 22-4-15-1 and Indiana Code 22-4-14-3 and any other statutory provisions relating to pregnancy of claimants for unemployment compensation from June, 1968, to the present.

3. All decisions of the Review Board interpreting or applying Indiana Code 22-4-15-1 and Indiana Code 22-4-14-3 and any other statutory provisions relating to pregnancy of claimants for unemployment compensation from June, 1968, to the present.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Compel Production of the documents described in paragraphs 4 through 6 of Plaintiffs' Request for Production of Documents (served August 12, 1977) is hereby GRANTED. Defendants shall not be required to produce

said documents at the offices of Plaintiffs' attorneys, but Plaintiffs' attorneys or persons working under their direction may inspect the documents described above at the offices of the Indiana Employment Security Board and its various divisions (or wherever said documents are located) and may take notes or make copies of those files applying or interpreting Indiana Code 22-4-15-1 and Indiana Code 22-4-14-3 and any other statutory provisions relating to pregnancy of claimants for unemployment compensation. When Plaintiffs have completed review of any particular file, Defendants are free to destroy said file. Plaintiffs are to begin their inspection and copying promptly and shall proceed with same with all due diligence. Defendants and their agents and employees shall make available to Plaintiffs whatever indexes or other information may exist which will aid them in locating relevant files.

This 24th day of July, 1978.

/s/ S. HUGH DILLIN
Judge, U. S. District Court

ADDENDUM

PORTIONS OF INDIANA EMPLOYMENT SECURITY LAW*

Sec. 22-4-2-9. "Fund" means the Employment Security Fund, established by IC 1971, 22-4-26-1, in which all contributions required, all payments in lieu of contributions and all money received from the Federal government as reimbursements pursuant to section 204 of the Federal-State Extended Compensation Act of 1970, 26 U. S. C. A. 3304n, shall be deposited and from which all benefits provided under this article shall be paid.

(As amended by Ch. 355, L. 1971; Ch. 239, L. 1973.)

*Reproduced from 4 CCH Un. Ins. Reps, Ind. Paras. 4010, 4124 and 4125.

Chapter 26. Employment Security Fund

Sec. 22-4-26-1. There is hereby established a special fund to be known as the Employment Security Fund which shall be administered separate and apart from all public monies or funds of the state. This fund shall consist of: (1) all contributions, all payments in lieu of contributions, all moneys received from the Federal government as reimbursements pursuant to section 204 of the Federal-State Extended Compensation Act of 1970 and monies paid into and received by it as provided in this Act; (2) any property or securities and the earnings thereof acquired through the use of monies belonging to the fund; (3) all other monies received for the fund from any other source. (4) all money credited to this State's account in the Unemployment Trust Fund pursuant to Section 903 of the Social Security Act, as amended and (5) interest earned from all monies in the fund. Subject to the provisions of this Article, the Board is hereby vested with full power, authority and jurisdiction over the fund, including all monies and property or securities belonging thereto, and may perform any and all acts whether or not herein specifically designated, which are necessary or convenient in the administration thereof consistent with the provisions of this Article, and the depository Act.

Sec. 22-4-26-2. The Fund shall be administered exclusively for the purpose of this Act, and monies withdrawn therefrom, except for deposit in the Unemployment Trust Fund and for refund, as provided in this Act, and except for amounts credited to the account of this State pursuant to Section 903 of the Social Security Act, as amended, which shall be used exclusively as provided in Section 2705 hereof, shall be used solely for payment of benefits. Payments of benefits and refunds shall be made in accordance with the regulations prescribed by the Board consistent with the provisions of this Act. Withdrawals from the Fund except as provided in Section 2705 hereof shall not be subject to any provisions of law requiring specific appropriations or other formal release by state officers of monies in their custody.

FEDERAL UNEMPLOYMENT TAX ACT

§ 3304. Approval of State laws

(a) Requirements.—The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that—

• • •

(12) no person shall be denied compensation under such state law solely on the basis of pregnancy or termination of pregnancy;

EEOC'S POST GE v. *GILBERT PROCEDURES*

Number 915
December 30, 1976

1. SUBJECT. PROCEDURES FOR PROCESSING PREGNANCY RELATED ALLEGATIONS OF SEX DISCRIMINATION.

2. PURPOSE. This notice establishes the procedure for processing charges of sex discrimination in light of *General Electric Co.* v. *Gilbert,* 45 U.S.L.W. 4031 (December 7, 1976).

3. ORIGINATOR. Office of Compliance Programs.

4. EFFECTIVE DATE. January 3, 1977.

• • •

6. The Commission has determined that distinctive treatment of pregnancy or maternity in the following situ-

ations continues to be unlawful because these criteria have a disproportionate impact on women and are therefore gender based or are by their terms gender based:

• • •

d. mandatory maternity leaves for predetermined time periods.

e. dismissals of pregnant women.

• • •

g. denials of unemployment benefits to pregnant women.

• • •

DEPARTMENT OF LABOR LETTER NO. 1-76
(Feb. 4, 1976)

Provisions in state unemployment insurance laws that discriminate on the basis of sex. *Unemployment Insurance Program Letters* No. 1-76, 2/4/76.

UIPL No. 1-76

1. *Purpose.* To inform the States of the U.S. Supreme Court's decisions in the *Turner* [Unemployment Insurance Reports, ¶ 21,476] case and its implications for State law provisions, interpretations, and policies which provide for blanket disqualification or ineligibilty of pregnant women.

2. *References.* UIPL 33-75.

3. *Background.* The petitioner, Mary Ann Turner was separated from work involuntarily for reasons unrelated to her pregnancy. She applied for and received benefits until 12 weeks prior to the expected date of the birth of her child. Pursuant to section 35-4-5(h)(1) of the Utah law, the agency then disqualified the claimant from receiving any further payments until six weeks after the date of the child's birth. Thereafter, Mrs. Turner worked intermittently as a temporary clerical employee. Section 35-4-5(h)(1) of the Utah Employment Security Act provides that an individual shall be ineligible for benefits or for purposes of establishing a waiting period.

"(h) For any week (1) within the 12 calendar weeks prior to the expected date of such individual's childbirth and within the six calendar weeks after the date of such childbirth;" [This provision was repealed, effective April 1, 1976.]

After exhausting all available administrative remedies, the petitioner appealed to the Utah Supreme Court the rulings of the State agency and the Board of Review which held her ineligible for unemployment benefits for the period specified in section 35-4-5(h)(1). She claimed that the statutory provision deprived her of protections guaranteed by the Fourteenth Amendment. The State Court rejected her contentions, ruling that the provisions violated no constitutional guarantee.

The U.S. Supreme Court, however, concluded that,

"... the Utah unemployment compensation statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid under the principles of the *LaFleur* case."

The Court granted the writ of certiorari, vacated the Utah Supreme Court judgment, and remanded the case to that Court for further proceedings not inconsistent with the above conclusion.

The *LaFleur* case (*Cleveland Board of Education et al* v. *LaFleur et al.*, 414 U.S. 632) concerned mandatory termination provisions of school boards, particularly those requiring pregnant school teachers to take unpaid maternity leave four or five months before expected childbirth. In that case,

decided January 21, 1974, the U.S. Supreme Court ruled that such requirements,

> ". . . amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.
>
> ". . . it is evident that there are large numbers of teachers who are fully capable of continuing work for longer than the . . . regulations will allow. Thus, the conclusive presumption embodied in these rules . . . is violative of the Due Process Clause."

According to the Court in *Turner*, the blanket disqualification represented by section 35-4-5(h)(1) of the Utah law rests on a conclusive presumption that women are unable to work during the 18-week period because of pregnancy and childbirth and "is virtually identical to the presumption found unconstitutional" in *LaFluer*. After observing that a substantial number of women are fully capable of working well into their last trimester of pregnancy and of resuming employment shortly after childbirth, the Court stated,

> "The Fourteenth Amendment requires that unemployment compensation boards no less than school boards must achieve legitimate state ends through more individualized means when basic human liberties are at stake."

In *Turner*, the Court contrasted the blanket disqualification represented by section 35-4-5 (h) (1) with another provision of the Utah statute (section 35-4-5(h) (2) which makes a woman ineligible for benefits,

> "When it is found by the commission that her total or partial unemployment is due to pregnancy."

The Court characterized the provision quoted above as requiring an individualized determination of ineligibility, as contrasted with a conclusve presumption of inability to work for a prescribed number of weeks.

Since the Court addressed its decision only to the blanket disqualification in section 35-4-5(h) (1) of the Utah law, we do not know whether the Court would consider the disqualification provision of section 35-4-5 (h) (2) quoted above to be constitutionally valid or invalid. This provision was not involved in the case because the petitioner had been separated from work involuntarily for reasons unrelated to her pregnancy. In any event, under the principles of the *Turner* case, we believe a determination must be individualized; i.e., must be based upon "an individual woman's physical status," and not upon "an irrebuttable presumption of physical incompetency" derived from the mere fact of pregnancy.

In our view, a determination disqualifying an individual from benefits when it is found that "her total or partial unemployment is due to pregnancy" as provided in section 35-4-5(h) (2) is as discriminatory as the Utah provision (section 35-4-5(h) (1) which the Court specifically struck down. Such a provision may mean only that the individual's work separation, whether a quit or a discharge, was be cause she was pregnant. A disqualification on the basis of such a provision would not be based on an individualized determination as to whether or not the individual was able

to work, but only on the fact that her unemployment was due to pregnancy.

As indicated above, the Utah law's section 35-4-5(h) (2) was not before the Court for decision in the *Turner* case and the Court did not rule on it. The Court's discussion of the blanket disqualification provision that was before it, however, gives reason to believe that section 35-4-5(h) (2) may also be of doubtful constitutionality.

4. *Action Required.* Where State law provisions, interpretations, or policies provide for disqualification or ineligibility of pregnant women for specified periods before expected date of childbirth and for specified periods after actual date of childbirth. State agencies should take immediate action to suspend operation of such provisions, interpretations or policies. State agencies should seek legislative repeal of any such statutory provisions. State agencies that are unable to suspend on their own authority the operation of such provisions immediately on the strength of the *Turner* decision should request an opinion from their State Attorneys General as to the effect they may give to such provisions.

If suits are brought by claimants against a State agency under the authority of the *Turner* decision to enjoin the State agency from withholding benefit payments pursuant to blanket pregnancy disqualification or ineligibility provisions as described above, it is likely that courts will grant injunctions repuiring an immediate change in the State's practice.

We urge States to take the opportunity to seek to change by legislation *all* discriminatory provisions in their unemployment insurance laws. A summary of discriminatory State provisions relating to pregnancy, domestic and

marital obligations, and dependents' allowances was attached to UIPL No. 33-75. [See below.]

We will be glad to provide States with necessary technical assistance in drafting the legislative amendments that will be needed.

U. S. DEPARTMENT OF LABOR LETTER NO. 1097

(December 31, 1970)

• • •

To: All State Employment Security Agencies

Subject: Provisions in State Unemployment Insurance Law Which Discriminate on the Basis of Sex

• • •

PURPOSE: To request State agencies to obtain early legislative action to remove State unemployment insurance law provisions which discriminate against persons on the basis of sex.

The enactment of P.L. 91-373 makes it necessary for the next session of State legislatures to amend extensively State unemployment insurance laws to implement the provisions of the new Federal law. This presents an opportunity to obtain significant improvements in State unemployment insurance laws which are unrelated to P.L. 91-373.

A much-needed improvement is the removal of the provisions which have crept into State unemployment insurance laws that discriminate against women. Aside from the obvious inequity of such provisions, they are becoming increasingly the subject of legislative scrutiny, of proposed legislative remedy, or of challenge in courts. The three

references used above, and discussed below, illustrate a growing trend.

• • •

2. *Pregnancy and post-pregnancy provisions*

Provisions in State laws subjecting pregnant and post-pregnant women to more stringent eligibility conditions than are applied for disabilities common to both sexes seem patently discriminatory. Insofar as the period of actual pregnancy is concerned, a claimant would, at some point during the pregnancy, be considered unable to work and/or unavailable for work even if the State law had no special "pregnancy provision." That being the case, special pregnancy provisions are subject to challenge as discriminatory.

The special post-pregnancy provisions in State laws which provide for some arbitrary period of ineligibility without regard to the point in time at which the actual disability terminated, or which impose some additional requirement or obstacle to reinstatement to eligible status which is not imposed in the case of any other disability are clearly discriminatory.

• • •

/s/ PAUL J. FASSER, JR.
Deputy Assistant Secretary
for Manpower and
Manpower Administrator

UAW, ET AL V. TAYLOR, ET AL, DISTRICT COURT ORDER AND JUDGMENT OF JULY 29, 1974

• • •

Upon plaintiffs' Complaint, attachments to said Complaint, and Motion for Partial Summary Judgment, upon submission of this Order and Judgment by plaintiffs, after

extensive conferences in Chambers, upon notice to members of the class named in plaintiffs' Complaint, and after a hearing in open Court, and the Court being fully advised in the premises:

NOW THEREFORE, it is hereby ordered and adjudged as follows:

I. It is declared that the practice of denying benefits under the Michigan Employment Security Act* to women employees, who are forced out of work due to so-called mandatory maternity leave clauses in contracts or to unilateral employer policies, is unlawful as contrary to Federal law. This Court expressly does not rule upon the validity of Section 48, MESA, or the leave of absence portion of said Section.

II. Defendants, their successors in office, agents and employees are hereby enjoined from denying benefits under the MESA to women employees solely due to their having involuntarily been placed on "leaves of absence" under said maternity leave clauses in contracts or unilateral employer policies.

III. Defendants, their successors in office, agents and employees are ordered to reopen, rehear and reconsider, in light of this Order and Judgment, the claims of all employees-claimants denied MESA benefits from and after April 5, 1972, solely due to such mandatory maternity leave contract clauses and to such "leaves of absence" unilaterally imposed due to employer policies. It is hereby ruled that said claims may be reopened under the MESA, because the issue in question—i.e., the lawfulness of said contract clauses and the State practice in relation thereto—

*Mich. Comp. Laws, Secs. 421.1, *et seq.;* Mich. Stats. Ann. Secs. 17.501, *et seq.;* hereinafter usually referred to as "MESA".

was not heretofore "disputed" within the MESA. This Order does not prejudice the rights or alleged rights of any employee-claimant, who was denied MESA benefits between June 30, 1965 and April 5, 1972, to on her own individually request the MESC for benefits which had been denied because of said maternity leave policies.

/s/ Hon. Charles Joiner
U. S. District Judge

• • •

UAW ET AL V. TAYLOR AND FIRESTONE V. TAYLOR—COURT OF APPEALS OPINION OF NOVEMBER 16, 1977

• • •

BEFORE: PHILLIPS, Chief Judge; LIVELY, Circuit Judge; and DUNCAN,* District Judge.

PER CURIAM. Appeals from final orders in two cases from the same district court have been consolidated. In No. 76-1474 Firestone appeals from an order denying its motion to intervene in an action *(UAW* v. *Taylor)* in which the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and various individuals were plaintiffs and the Michigan Employment Security Commission (MESC) and its director and members were defendants. Final judgment in *UAW* v. *Taylor* was entered by agreement of the parties on July 29, 1974. Firestone's motion to intervene was filed November 17, 1975.

In denying the motion to intervene for lack of timeliness the district court found that Firestone had "informal and actual notice" of the July 29, 1974 judgment and a subsequent order entered July 28, 1975. This finding is amply supported by the record. The district court found that Firestone was neither a necessary nor an indispensable party to *UAW* v. *Taylor,* which involved the validity under federal law of the practice of MESC of denying unemployment compensation to employees in Michigan who were forced to take leaves of absence due to pregnancy. We find no such compelling circumstances in this case as would require the district court to permit intervention after entry of final judgment. The district court did not abuse its discretion in denying intervention. *FMC Corporation* v. *Keizer Equipment Co.,* 433 F.2d 654 (6th Cir. 1970).

*The Honorable Robert M. Duncan, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

Approximately three months after it was denied intervention in *UAW* v. *Taylor,* Firestone filed an independent action in the district court seeking a declaratory judgment and injunctive relief (the second action). The defendants in the second action were MESC together with its director and members and the UAW. In No. 76-1966 Firestone appeals from entry of summary judgment for all the defendants in the second action. UAW cross-appeals in No. 76-1967 from the district court's denial of its motion to recover its expenses in defending the second action.

Firestone based its claim for declaratory and injunctive relief on three contentions: (1) that the district court in *UAW* v. *Taylor* enjoined the operation of §48 of the Michigan Employment Security Act (the Act) "on the ground that it violated the United States Constitution," a judicial act requiring a statutory three-judge court; (2) that there was no case or controversy in *UAW* v. *Taylor;* and (3) that MESC failed to represent Firestone's interests. An examination of the record in *UAW* v. *Taylor,* refutes these claims.

Judge Joiner specifically refrained from finding §48 of MESC unconstitutional. Rather, he found that the practices of MESC in administering the Act violated federal law. The plaintiffs in *UAW* v. *Taylor* had specifically pled that contract clauses requiring mandatory leaves of absence for pregnancy, which MESC was enforcing in its denial of unemployment benefits, violated Title VII of the 1964 Civil Rights Act. Both the July 29, 1974 and the July 28, 1975 orders of the district court, which Firestone attacked in the second action, referred specifically to June 30, 1965, the effective date of the Civil Rights Act of 1964. As to Firestone's second contention, the fact that *UAW* v. *Taylor* was eventually terminated with a consent judgment does not indicate that there was no case or controversy between the parties. See *United States* v. *Board of School Commissioners,* 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied,* 410 U.S. 909 (1973).

Finally, Firestone fails to allege facts suggesting that its interests were not adequately represented. Courts have recognized that ". . . a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee." (citations omitted). *Commonwealth of Pa.* v. *Rizzo,* 530 F.2d 501, 505 (3d Cir. 1976), *cert. denied,* 426 U.S. 921 (1976). See *Southwest Airlines Co.* v. *Texas Intern. Airlines,* 546 F.2d 84, 98 (5th Cir. 1977), *cert. denied,* 46 U.S.L.W. 3188 (1977). MESC has the authority to promulgate rules and regulations to carry out the provisions of the Act, M.C.L.A. §421.4; two of its four voting members represent employer interests, M.C.L.A. §421.3. Firestone does not claim that MESC acted in bad faith. Indeed, the record reveals competent representation by the Commission. That its efforts culminated in a consent decree

is not evidence *per se* of inadequate representation. *United States* v. *Board of School Commissioners,* supra.

The district court decided the substantive issues in *UAW* v. *Taylor* which Firestone seeks to raise in the second action. At oral argument counsel for Firestone stated that the purpose of the second action is to get MESC and Judge Joiner to reexamine their positions. Having failed to make a timely motion to intervene in *UAW* v. *Taylor*. Firestone has no clear right to such a reexamination. The district court did not abuse its discretion in entering summary judgment for the defendants in the second action.

The judgments of the district court are affirmed on appeal and cross-appeal. The appellees will recover their costs on appeal in No. 76-1474. Each party will bear its own costs on appeal in Nos. 76-1966 and 76-1967.

JORDAN V. MESKILL—DISTRICT COURT ORDER OF JUNE 26, 1973

• • •

Order

Zampano, J. The plaintiff herein having filed this class action entitled "Sabine D. Jordan, individually and on behalf of all other persons similarly situated, Plaintiff v. Thomas J. Meskill, as governor of the State of Connecticut, and Jack A. Fusari, as successor of Renato E. Ricciuti, individually and in his official capacity as Commissioner of Labor and as Administrator under the Unemployment Compensation Act of the State of Connecticut, and Donald A. Jepsen, individually and in his official capacity as successor to Leonard M. Caine, Commissioner-at-large, Interstate Appeals Section, and Thomas J. McNally, individually and in his official capacity as Manager, Interstate Office, Unemployment Compensation Department, Labor Depart-

ment of the State of Connecticut, Defendants," in which action the following claims for relief among others, have been made.

(1) that a three-judge court be convened to determine the controversy pursuant to 28 U.S.C. Secs. 2281, 2284;

(2) that Connecticut General Statutes Sec. 31-236(5) be declared unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States and that a permanent injunction be issued prohibiting the defendants, their successors, agents, employees and other persons from acting under the authority of said statute;

(3) that the defendants be required to pay to plaintiff all unemployment benefits that would be due her if Connecticut General Statutes Sec. 31-236(5) had not been in effect;

(4) that the defendants furnish to plaintiff and the members of her class a full and detailed accounting of all unemployment benefits that have been denied pregnant female claimants during the six-year period preceding March 8, 1973; and

(5) that court costs and reasonable attorneys' fees be assessed against defendants; and

The Court having considered all memoranda, motions and briefs filed by the parties, and having conducted lengthy conferences in chambers, and being cognizant of the passage of Public Act 73-140 whereby section 31-236(5) is repealed, and being of the opinion that a fair and just resolution of this dispute has been reached,

Now Therefore, it is

1. Ordered, that this action be and the same hereby is withdrawn as to the following defendants: Thomas J. Meskill, as governor of the State of Connecticut, Donald A. Jepsen, individually and in his official capacity as successor to Leonard R. Caine, Commissioner-at-large, Interstate Appeals Section and Thomas J. McNally, individually and in his official capacity as manager, Interstate Office, Unemployment Compensation Department; and this case shall henceforth be known as "Sabine D. Jordan, individually and on behalf of all other persons similarly situated, Plaintiff v. Jack A. Fusari, as successor to Renato E. Ricciuti, individually and in his official capacity as Commissioner under the Unemployment Compensation Act of the State of Connecticut," and it is further

2. Ordered, that the defendant, his successors, agents, employees, and assigns, and all others to whom notice of this order shall come, shall be and they hereby are permanently enjoined from seeking to enforce or carry out in any manner the terms and provisions of Section 31-236 (5); and it is further

3. Ordered, that the defendant shall, no sooner than 30 nor later than 90 days from the date of this order, give written notice, in the form set forth in Appendix A, by regular mail, postage prepaid to the last known home addresses of all female claimants who have been denied benefits or from whom benefits have been withheld by reason of the provisions of Section 31-236(5) at any time since and including February 14, 1973; and it is further

4. Ordered, that defendant shall comply with said notice in Appendix A; and it is further

5. Ordered, that the defendant within 15 days of the mailing of the last Appendix A notice shall file with the Court a certified list of the names and addresses of all claimants to whom the notice has been sent, which list shall be impounded and sealed, but may be opened and disclosed by the Court for good cause, and it is further

6. Ordered, that on or about August 9, 1973 the defendant shall publish the notice attached hereto as Appendix B in the following newspapers:

• • •

The plaintiff at her own expense, may publish or circulate the notice in any other newspapers, periodicals or other publications of her choice. The heading of the notice shall be printed in no smaller than 14 point type and the body of the notice in no smaller than 8½ point type. Said notice shall also be printed in poster-type lettering on a poster no smaller than 8½ x 13 inches in size which shall be affixed to all bulletin boards and other places in the offices of the Employment Security Division and ony other offices or places of business where notices to employees or claimants regarding unemployment compensation matters are customarily posted; and it is further

7. Ordered, that defendant shall comply with said notice in Appendix B; and it is further

8. Ordered, that defendant shall from the date of this order until October 1, 1973, distribute to all claimants, potential claimants or persons making inquiries at unemployment compensation offices and include with all applications and pamphlets issued or distributed by him, the notice hereto annexed as Appendix C copies of which notice shall be furnished without cost by plaintiff to defendant, the notice to be delivered to defendant at his Wethersfield office; and it is further

9. Ordered, that defendant shall instruct and direct his subordinates, agents, officials, employees and all other persons subject to his direction and authority to aid, assist and cooperate with women who appear to file or make inquiries in response to this order or the notices appended

hereto, to the end that all women who may conceivably be entitled to recovery of benefits shall have a full and fair review and hearing of their claims; and such aid, assistance and cooperation shall include providing such women with the Appendix C notice; and it is further

10. Ordered, that defendant shall pay to the named plaintiff, Sabine Jordan, those benefits to which it is determined that she is entitled, to and including April 28, 1972, receipt of which benefits is acknowledged, and said Sabine Jordan shall further be permitted to have a hearing on any claim for additional benefits asserted to be due by her for any period after April 28, 1972; and it is further

11. Ordered that said Sabine Jordan shall forthwith inform the Equal Employment Opportunity Commission that she desires to withdraw the complaint filed by her with said Commission; and it is further

12. Ordered, that any claim filed by Sabine Jordan in accordance with Paragraph 10 hereof and the claims of any person appearing and asserting the right to benefits in accordance with this order and the appendices hereto shall be deemed timely filed, and the eligibility of said claimants for unemployment compensation benefits shall be determined after a fair hearing and review in the same manner and based upon the same criteria as are applicable to all other claimants, male or female, without regard to any of the provisions of Section 31-236(5); and it is further

13. Ordered, that nothing contained in this order shall be deemed to bar or to prejudice, or to support a defense of *res judicata* or collateral estoppel in any suit subsequently filed against the defendant by a claimant or class of claimants for unemployment compensation benefits who have been denied benefits prior to February 14, 1973 and who

seek in such subsequently filed suit relief either similar to or different from the relief sought in this case, provided, however, that this order shall be a bar to any further action by (1) a claimant to whom the Appendix A notice shall have been timely sent and received, or (2) a claimant who comes within the provisions of the Appendix B notice and who actually files a timely claim in accordance with said notice; and it is further

14. Ordered, that defendant shall deduct and remit to Women's Law Fund, Inc., and Sosnoff, Cooper & Whitney, jointly, a sum equal to 10% of the benefits payable to

(a) any woman who has previously been denied benefits by virtue of General Statute Sec. 31-236(5) and whose right to such benefits has been redetermined as a result of the operation of this order or in anticipation thereof; and

(b) Any woman filing a claim for benefits at any time prior to October 1, 1973 covering any period of pregnancy or post-childbirth who under the terms of Sec. 31-236(5) is or would be ineligible for benefits but who nevertheless is paid such benefits.

Defendant shall remit to the attorney for plaintiff all sums deducted from claimants in accordance with this paragraph on or before the 10th day of the month following the month in which the deduction was made.

LASKO V. GARNES—DISTRICT COURT ORDER OF AUGUST 14, 1973

• • •

U. S. District Court, Northern District of Ohio, Eastern Division. Civil No. C72-1350, 8/14/73. Before Weick, Circuit Judge. Kalbfleisch, and Krupansky, JJ.

Plaintiff, individually and on behalf of all women who "have been denied unemployment benefits, are presently

being denied unemployment benefits and in the future will be denied unemployment benefits because of pregnancy," seek an Order from this Court declaring Ohio Revised Code §4141.29(D)(2)(c) of the Ohio Unemployment Compensation Law unconstitutional. Since plaintiff seeks to enjoin the enforcement of a state statute, a three-judge court was convened pursuant to the provisions of 28 U. S. C. § 2281.

This Court has reviewed the pleadings, briefs, affidavits and stipulations of counsel and finds that Ohio Rev. Code § 4141.29(D) (2)(c) is constitutional on its face. Accordingly, in light of the strict interpretation which this Court must attach to the provisions of 28 U. S. C. § 2281, It Is Hereby Ordered that the three-judge panel be dissolved and this case be remanded to the requesting District Court Judge for any further proceedings not inconsistent with this Opinion. *Board of Regents* v. *New Left Education Project*, 404 U. S. 541, 92 S. Ct. 652 (1972); *Allen* v. *State Board of Elections*, 393 U. S. 544, 89 S. Ct. 817 (1969); *Swift & Co.* v. *Wickham*, 382 U. S. 111, 86 S. Ct. 258 (1965).

It Is So Ordered.

Kalbfleisch, Senior D. J. and Krupansky, D. J., Concurring:

We concur with the finding of the Court in the majority opinion that the statute in question is constitutional on its face but deem it necessary to elucidate further in holding that the provisions of § 4141.29 (D) (2)(c) have been applied in an unconstitutional fashion to the plaintiff and the class she seeks to represent.

The stipulations entered into by the parties provide that:

1. Plaintiff was discharged by her employer on October 13, 1972, due to her pregnancy and is now and was at all times physically capable of performing her duties as a secretary-receptionist;

2. Plaintiff was denied benefits because of pregnancy by the Ohio Bureau of Employment Services on November 8, 1972, pursuant to the provisions of Ohio Revised Code § 4141.29(D)(2)(c) and was unemployed from the date of her discharge until December 26, 1972, when she found part-time employment;

3. Plaintiff has met the general eligibility requirements for unemployment benefits as set forth under Ohio Revised Code § 4141.29(A)(1-5) and § 4141.01(Q), (R).

In *Richards* v. *United States,* 369 U. S. 1 82 S. Ct. 585 (1962), the United States Supreme Court expressed the standard of review which this Court is obliged to follow in the instant case:

> We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." (Footnotes omitted) *Richards* v. *United States,* 369 U. S. at 11.

The legislative purpose of the subject statute is enunciated in the prefatory language of Ohio Revised Code § 4141.29. It provides that:

> Each eligible individual shall receive benefits as compensation for loss of remuneration due to *involuntary* total or partial unemployment in the amounts and subject to the conditions stipulated in Section 4141.01 to 4141.46, inclusive, of the Revised Code. (Emphasis added)

This prefatory language must be read in para materia with the questioned legislation. *Richards* v. *United States, supra.* The language questioned in this case is as follows:

> (D) [N]o individual may serve a waiting period or be paid benefits . . .
>
> • • •
>
> (2) For the duration of his unemployment if the administrator finds that:
>
> • • •
>
> (c) Such individual quit work to marry or because of marital, parental, filial, or other domestic obligations or became unemployed because of pregnancy; Ohio Rev. Code § 4141.29(D)(2)(c).

Both plaintiff and defendants construe the above-cited portion of the statute which states "or became unemployed because of pregnancy" as implying that the unemployment occasioned by either voluntary or involuntary actions of the claimant is cause for the denial of benefits.[1] Certainty, when this portion of the statute is read in light of the purpose of the Unemployment Compensation Act, Ohio Revised Code §§ 4141.01 et seq., such a construction cannot be sustained. The stated purpose of this legislation is the compensation of those persons who have been terminated from their employment *involuntarily.* Ohio Rev. Code § 4141.29.

While the issue regarding the application of the statute

---

[1] It has been alleged in plaintiff's brief in support of her cause of action that the Ohio Bureau of Unemployment Compensation of which defendants Garnes and Schulze are officers, has distributed a pamphlet which provides as follows:

> [D]isqualification is imposed whenever it is found that the reason for her unemployment is due to pregnancy regardless of whether she quit or was discharged.
>
> The defendants have not controverted this allegation, but rather have admitted that such an interpretation is imposed.

in question was not before the three-judge panel, it is apparent that defendants have applied the clear and unambiguous language of this section of the statute in an impermissible fashion, that plaintiff and the class she seeks to represent have been damaged by such application; and that if such an impermissible application is not enjoined, prospective members of plaintiff's class will be irreparably damaged and without an adequate remedy at law.

Krupansky, J.: This case has been remanded to the Court for further proceedings not inconsistent with the Memorandum and Order issued by the three-judge panel.

The Concurring Opinion in which this Court joined, held that Section 4141.29(D)(2)(c) of the Ohio Revised Code was being applied in an unconstitutional fashion so as to preclude plaintiff and the class she seeks to represent from receiving unemployment compensation benefits. In accordance with that finding, the Court hereby enters the following Order:

1. The Court finds that this action is properly maintained as a class action under the provisions of Rule 23 (b)(2), Federal Rules of Civil Procedure. The class is identified as consisting of all females in the State of Ohio involuntarily discharged by their employers due to pregnancy and who have filed an application for determination of benefit rights with the Ohio Bureau of Employment Services on or after October 22, 1972, and who are physically able to and desirous of continuing employment and who are otherwise eligible for unemployment benefits but have been, or in the future will be denied benefits under Ohio Revised Code, Section 4141.29(D)(2)(c);

2. Defendants are permanently enjoined from denying unemployment compensation benefits to those women

who in the future apply for such benefits because of involuntary discharge from employment due to pregnancy, and who are otherwise qualified to receive benefits;

3. Defendants shall afford benefits to those women who filed applications for benefits from October 22, 1972, to the date of this Order, and who were involuntarily discharged from employment due to pregnancy and are otherwise qualified to receive benefits;

4. Plaintiff Edythe M. Lasko be granted damages in accordance with the pre-trial stipulations filed with this Court;

5. Plaintff's application for attorneys' fees is hereby denied;

6. Costs are assessed against the defendants.

It Is So Ordered.